SUPREME COURT

OF THE

UNITED STATES

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OCTOBER TERM, 1943

No. 172

THE WASHINGTON WATER POWER COMPANY, a corporation, THE CITY BANK FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, as Trustee, STEVENS COUNTY, WASHINGTON, and FERRY COUNTY, WASHINGTON.

Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, and Brief in Support Thereof.

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Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

The petitioners, The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as trustee, and Ferry County, Washington, and Stevens County, Washington PRAY that a writ of certiorari issue to review the decree entered in the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled matter which decree was filed and entered April 30, 1943, (R. p. 338) affirming, as modified by striking therefrom the judgments in favor of Stevens and Ferry Counties, the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division. The opinion (R. pp. 332-338) upon which the Decree of the Circuit Court of Appeals was entered is reported in 135 Fed. (2d) 541.

Summary Statement of the Matter Involved

In the course of the condemnation suit at bar the United States of America had judgment entered upon a declaration of taking giving it title to and possession of the lands at Kettle Falls on the Columbia River, which, prior to the time of taking, were held and being developed by The Washington Water Power Company for power site purposes. At the subsequent trial of said cause it was stipulated that the lands so taken had a value of $7,950.35 for any or all purposes for which they are adapted other than power site values (R. p. 45).

At the time of the trial in the District Court The Washington Water Power Company made many offers of proof by different witnesses the substance of which was: That the land in question had been recognized in surveys and studies as one of the most suitable and feasible sites on the Columbia River for the development of electrical energy (R. p. 134). That the State of Washington, acting by and through its land commissioner, had agreed to sell the shore lands on each side of the Columbia River to The Washington Water Power Company and that the agreement was in full force and effect when the United States authorized and adopted the Grand Coulee Dam project (R. pp. 137, 138). That the investment of The Washington Water Power Company for necessary preliminary engineering and survey work, including the cost of the lands, was the fair and reasonable sum of $465,785.97 (R. p. 160). That The Washington Water Power Company had the financial capacity

and was ready to develop the land as a power site as soon as the needs and demands of the Company required its construction (R. pp. 232, 233). That various qualified experts would testify as to the reasonable market value of the property on the basis of its value for a power site at the time of taking. The said value according to the offers of proof by such experts was approximately $500,000.00.

After rejecting all the said offers of proof the learned District Judge instructed the jury to bring in verdicts for defendant, The Washington Water Power Company, for $7,950.35, in the sum of $1,950.76 for defendant Stevens County, and for $1,033.20 for Ferry County, Washington. The two last mentioned sums represented the amounts due each of the counties for taxes levied and assessed during the year 1939 when the United States acquired title and possession of the land with interest thereon. Judgments were entered in favor of each of the aforesaid defendants for the amounts of the verdicts which the jury returned in accordance with the instruction of the trial judge.

Two appeals followed the entry of the judgments. One by The Washington Water Power Company from the judgment in its favor for $7,950.35, the other by the United States from the judgments in favor of each of the defendant counties.

The Circuit Court of Appeals affirmed the judgment appealed from by The Washington Water Power Company, but modified the judgment entered by the District Court by striking therefrom the judgments in favor of Stevens and Ferry Counties (R. p. 339).

JURISDICTIONAL STATEMENT

Statutory Provisions Believed to Sustain Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code Section 240 amended, Title 28 U.S.C. Section 347 (a). Mar. 3, 1891, c. 517, §6, 26 Stat. 828; Mar. 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229, §1, 43 Stat. 938; Jan. 31, 1928, c. 14, §1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926).

Cases believed to sustain the jurisdiction of this Court are:

S. S. Ansaldo San Giorgio I vs. Rheinstrom Bros. Co., 294 U. S. 494, 79 Law. ed. 1016, 55 S. Ct. 483.

United States vs. Miller, 317 U. S. 369, 87 Law. ed. (Adv.) 251, 63 S. Ct. (Adv.) 276.

The United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, Petitioner, vs. W. V. N. Powelson, Assignee and Successor in Interest of Southern States Power Company, et al. 318 U. S. ....., 87 Law. ed. (Adv.) 976.

Date of Decree

The date of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, which it is sought to have reviewed, is April 30, 1943 (R. p. 338). June 5, 1943, the Circuit Court of Appeals entered an order denying petition of appellants for a rehearing (R. pp. 339).

NATURE OF THE CASE AND RULINGS OF THE COURT

The United States of America acquired property owned by The Washington Water Power Company by virtue of a judgment upon its declaration of taking December 9, 1939 (R. pp. 33-43).

It was stipulated by and between the United States of America and The Washington Water Power Company that the lands of the defendant The Washington Water Power Company, being condemned in this proceeding, have a reasonable value for agricultural, grazing and timber purposes and for all or any other purposes for which they are adapted other than for power site values equal to the amount deposited in the Court by the plaintiff as the estimated value of the said tract of land, to-wit: The sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars, ($7,950.35). (R. p. 45)

At the time of the trial in the District Court The Washington Water Power Company made a series of offers of proof (R. pp. 133-241) the substance of which was: That the land in question had been recognized in surveys and studies as one of the most suitable and feasible sites on the Columbia River for the development of electrical energy. That by virtue of contract The Washington Water Power Company had acquired the right to purchase the shore lands on each side of the Columbia River, which right was in existence when the United States authorized and adopted the Grand Coulee Dam project. That the investment of The Washington Water Power Company in the

property condemned was $465,785.97. That The Washington Water Power Company was financially able and was ready to develop the land as a power site within the reasonably near future and that its application for Federal license to develop same was pending at the time the Grand Coulee Dam project was adopted by the Government. That the reasonable market value of the property on the basis of its value for power site purposes at the time of taking was approximately $500,000.00.

Objections to each and all of The Washington Water Power Company's said offers of proof were sustained by the Court and exceptions taken by The Washington Water Power Company to each of the said rulings sustaining such objections were allowed by the Court.

The above mentioned offers of proof by The Washington Water Power Company having been objected to and the objections having been sustained The Washington Water Power Company rested.

Ferry County, Washington, proved the amount of the tax and interest levied and assessed against the property in 1939 upon the lands of The Washington Water Power Company taken and submerged by the Government in Ferry County (R. pp. 66-78). Defendant Stevens County introduced evidence as to the amount of the tax and interest levied and assessed against the property in 1939 that had been taken and submerged by the United States in that county (R. pp. 79-85). No evidence was introduced by the Gov-

ernment to dispute the testimony offered on behalf of Stevens and Ferry Counties.

At the time of the taking, that is December 9, 1939, (R. p. 43) the taxes for the year 1939 were an existing lien upon the property taken (Rem. Rev. Stat. Sec. 11265). Stevens and Ferry Counties of Washington were made parties defendant by the United States of America, (R. p. 3) and the Government by its declaration of taking (R. p. 20) and the judgment entered thereon took the fee simple title to the lands herein condemned (R. p. 33).

All the parties to the trial having rested, the learned judge of the District Court instructed the jury to return a verdict in favor of the defendant The Washington Water Power Company in the sum of $7,950.35 (R. p. 247), and also instructed the jury to return a verdict in favor of the defendant Stevens County in the agreed sum of $1,950.76, and for the defendant Ferry County in the agreed sum of $1,033.20 (R. p. 248). The Washington Water Power Company and the United States of America were each allowed exceptions to the Court's instructions to the jury (R. p. 248). The jury returned verdicts in accordance with the Court's instructions and the judgment of the District Court was entered thereon for the amounts of said verdicts.

The Washington Water Power Company appealed to the Circuit Court of Appeals from the judgment entered by the trial judge on the verdict in its favor for $7,950.35, and the United States of America likewise

appealed from that part of the judgment which was predicated upon the jury's verdicts in favor of Ferry and Stevens Counties for the taxes levied and assessed for the year 1939.

The Circuit Court of Appeals entered a decree, modifying the judgment of the District Court by striking therefrom the judgments of Stevens and Ferry Counties and affirmed the judgment as modified (R. p. 338), Reported in 135 Fed. (2d) 541.

It is that decree of the Circuit Court of Appeals which petitioners seek to have reviewed.

Questions Presented

(1) If land be the only land available for the purpose of a damsite on a navigable river and as such has a market value which can fairly be determined because of its probable use in connection with a damsite in the reasonably near future, can the United States of America as an incident of the taking deny a permit for a license to develop the project of which the land is an indispensable part, and thereby be excused from paying just compensation measured by the value of the property at the time when the license was denied as an incident of the taking?

(2) Can the United States of America acquire title in fee simple to lands subject to a valid and existing tax lien, by making the County having such tax lien a party to a suit in eminent domain, and having judgment entered on a declaration of taking, granting it title in fee simple, without becoming liable to

the County for the amount of the taxes constituting such lien, under a Washington Statute which expressly provides that as between buyer and seller such lien shall not attach until a definite calendar date, when the construction given such Washington Statute by the Supreme Court of that State makes it applicable to condemnation suits and construes the lien as not attaching between condemnee and condemnor in the case of land acquired prior to the date fixed by Statute when such lien shall attach as between buyer and seller?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

We believe that in the case at bar the questions above set forth are fairly presented by the record.

In making the decision sought to be reviewed the United States Circuit Court of Appeals for the Ninth Circuit has, we believe, decided a Federal question in a way probably in conflict with an applicable decision of this Court—i. e. *United States v. Chandler-Dunbar Water Power Company*, 229 U. S. 53, 57 Law. ed. 1063, 33 S. Ct. 667, wherein this Court held that the respondent in the condemnation suit was entitled to recover from the United States the value of lands adjoining a navigable river for use for canal and lock purposes. In view of the very large number of condemnation suits by the United States which are now pending we believe and respectfully urge that the Writ of Certiorari should be granted because of the public importance of the issues presented by each and both of the foregoing questions.

See: *United States vs. Miller,* 317 U. S. 369, 87 Law. ed. (Adv.) 251. *The United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, Petitioner, vs. W. V. N. Powelson, Assignee and Successor in Interest of Southern States Power Company, et al.,* 318 U. S....., 87 Law. ed. (Adv.) 976.

For these reasons it is respectfully prayed that this petition should be granted.

Respectfully submitted,

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Attorney for petitioners, The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee.

ALAN G. PAINE
Of counsel for petitioners, The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee.

RICHARD W. NUZUM
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Attorney for Petitioners, Stevens County, Washington, and Ferry County, Washington.

DELBERT R. SCOLES
Of Counsel for Petitioner, Stevens County, Washington.

OSEE W. NOBLE
Of Counsel for Petitioner, Ferry County, Washington.

STATE OF WASHINGTON }
COUNTY OF SPOKANE } ss.

Henry E. T. Herman and Richard W. Nuzum, members of the Bar of the Supreme Court of the United States and counsel for petitioners herein, do hereby certify that the foregoing petition is well founded and not interposed for delay.

HENRY E. T. HERMAN
RICHARD W. NUZUM

SUPREME COURT
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Petitioners,

vs.

UNITED STATES OF AMERICA.

Brief in Support of Petition for Writ of Certiorari

OPINIONS OF THE COURTS BELOW

The ruling of the District Court for the Eastern District of Washington, Northern Division, by reason of which that Court sustained the objections to each and all of the offers of proof by petitioner, The Washington Water Power Company, is set forth in the reported opinion of *United States vs. The Washington Water Power Company,* 41 F. Supp. 119. It is set forth on pages 116-132 of the Record.

The opinion of the trial Court upon which he predicated the instructions to the jury to bring in verdicts for Stevens County and Ferry County for the amount of the taxes levied in 1939 and the interest thereon is not printed in any report, but is set forth on pages 115 and 116 of the Record.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, reported in 135 Fed. (2d) 541, upon which that Court entered the decree

here sought to be reviewed, which modified the judgment of the District Court by striking therefrom the judgments of Stevens and Ferry Counties and affirming the judgment as modified, is set forth in the Record at pages 332-338.

Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code Section 240 amended, Title 28 U.S.C. Section 347 (a). (Mar. 3, 1891, c. 517, §6, 26 Stat. 828; Mar. 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229, §1, 43 Stat. 938; Jan. 31, 1928, c. 14, §1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926)

The date of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, which it is here sought to have reviewed, is April 30, 1943 (R. p. 338).

A statement of the grounds upon which the jurisdiction of this Court is invoked is set forth in the preceding petition, pp. 4 to 8, to which statement, reference is here made for the sake of brevity.

Cases believed by petitioners to sustain the jurisdiction of the Supreme Court of the United States and relied on for the exercise of said jurisdiction are:

S. S. Ansaldo San Giorgio I vs. Rheinstrom Bros. Co., 294 U. S. 494, 79 Law. ed. 1016, 55 S. Ct. 483.

United States vs. Miller, 317 U. S. 369, 87 Law. ed. (Adv.) 251, 63 S. Ct. (Adv.) 276.

The United States of America Upon the Relation and for the Use of the Tennessee Valley Authority,

Petitioner, vs. W. V. N. Powelson, Assignee and Successor in Interest of Southern States Power Company, et al., 318 U. S. ....., 87 Law. ed. (Adv.) 976.

Assignments of Error

I. The Circuit Court of Appeals erred in modifying the judgment of the District Court by striking therefrom the judgments in favor of Stevens and Ferry Counties.

II. The Circuit Court of Appeals erred in entering a decree affirming the judgment of the District Court as modified, thereby depriving The Washington Water Power Company, one of the petitioners herein, of the property without paying therefor the market value which can be fairly determined.

Petitioners, by their counsel, hereby specify each and both of the aforesaid assignments of error, in their entirety, as the assigned errors intended to be urged, the first of said assignments of error is made in connection with the tax questions set forth on pages 8 and 9 of the petition, and the second of said assignments of error is made in connection with the question re "market value which can fairly be determined" set forth on page 8 of the petition.

STATEMENT OF THE CASE

For the sake of brevity, we refer to the statements in the preceding petition re: Summary Statement of the Matter Involved (Petition, pp. 2, 3) and Nature of the Case and of the Rulings of the Court (Petition, pp. 5-8).

ARGUMENT

The decison sought to be reviewed is in conflict with those opinions of this court which hold the United States when condemning property must pay "market value fairly determined."

The decision of the District Court, as affirmed by the Circuit Court of Appeals, is in conflict with decisons of this Court in that it denies the defendants the right to just compensation for their property, by denying them the right to prove "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future."

Olson vs. United States, 292 U. S. 246, 255, 78 Law. ed. 1236, 54 S. Ct. 704.

Other opinions of this court which are in conflict with the decision in the case at bar are:

U. S. vs. Chandler-Dunbar Water Power Co., 229 U. S. 53, 57 Law. ed. 1063, 33 S. Ct. 667.

Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 Law. ed. 206.

U. S. vs. Miller, 317 U. S. 369, 87 Law. ed. (Adv.) 251.

U. S. ex rel Tennessee Valley Authority vs. Powelson, 318 U. S. ...., 87 Law. ed. (Adv.) 976.

The question here presented is whether the government in taking these lands in connection with construction of the Grand Coulee Dam project, could, as an incident of that taking, deny the defendants the right to develop them as a power site and thus make impossible their use for such purpose, so that that

use may not be considered in determining their fair market value, even tho such value had existed and been recognized on the "market" at the time of the taking.

In the *U. S. vs. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 Law. ed. 1063, the government condemned land owned by the company at Sault St. Marie, Michigan.

The company claimed that one parcel of land was valuable for canal and locksite purposes, even tho the operation of the canal and locks involved the use of the waters of the Sault St. Marie River, a concededly navigable stream. This value the Supreme Court allowed because it was reasonably probable that such use would be made of the lands in the reasonably near future.

> "That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose." 229 U. S. 53, 76, 77, 57 Law. ed. 1063, 1081, 33 S. Ct. 667.

In the instant case, the defendants offered to prove that not only had the proposed use "passed beyond

the region of the purely conjectural or speculative," but that the property had been purchased by The Washington Water Power Company. This was an existing hydro-electrical company serving Eastern Washington and Northern Idaho, with ample financial backing, ready, willing and able to put the lands to power site uses. It had expended in excess of $400,000 in acquisition and development of the site. It had made arrangements for the necessary rights from the State of Washington, had pending an application with the Federal Power Commission for a license and would have been in the process of constructing the project at the time of the taking but for the condemnation.

The same Chandler-Dunbar case was relied upon by the government as authority for the proposition that no value could be allowed for power site purposes because the land was situated upon a navigable stream and the riparian owner had no title to the bed of the stream nor the flow of the river "and therefore could not recover for these rights which he did not own." The distinction as we see it is this—that the defendants do not claim any such values, but claim only the "fair market value" of the land itself as affected by the reasonable likelihood that the necessary permission to so use the land could be obtained, which value, of course, would be subject to proof and determination by a jury; that such value was allowed for the canal and locksite land in the Chandler-Dunbar case and was not allowed here.

The decision sought to be reviewed is also in conflict with the decision of this court in,

Mississippi & Rum River Boom Co. vs. Patterson, 98 U. S. 403, 25 Law ed. 206.

In that case certain islands in the Mississippi River were condemned. These islands had their greatest value as anchors for booms across the Mississippi River. The condemning company had been granted exclusive privileges to mantain a boom on the river and contended that the owner therefore could not use his property for this purpose, and therefore it had no value for such purpose. This court denied this contention and held:

> "Aside from this, we do not think that the State is precluded by anything in the charter of the Company from giving a license to the defendant in error to construct a boom near his lands. Moreover, the United States, having paramount control over the river, may grant such license if the State should refuse one. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned." 98 U. S. 403, 409, 25 Law. ed. 206, 209.

The United States had not granted any such license; it might not grant it, but on the other hand it could grant it and it was reasonable to assume that it would. If such likelihood was sufficient to affect the market value, the owner was entitled to have it considered. In the case at bar the owner was denied the right to have the likelihood of his obtaining a power license considered as affecting the value of his property.

Further, the court laid down this principle:

> "In determining the value of land appropriated for public purposes, the same considerations

> are to be regarded as in a sale of property between private parties." 98 U. S. 407, 408, 25 Law. ed. 208.

This statement is in direct conflict with the holding in the decision here sought to be reviewed. It is undisputed that as between private parties this land would sell and had sold for a price in excess of its price for agricultural purposes, yet the owner was denied the right to offer evidence on this point.

Two condemnation cases decided by this court at its last term are, in our opinion, in conflict with the decision in this case. In *United States vs. Miller,* 317 U. S. 369, 87 Law. ed. (Adv.) 251, 63 S. Ct. (Adv.) 276 the court held:

> "Where, from the date of its authorization by Act of Congress, a federal reclamation project included the relocation of a line of railroad, and a probable route was marked out over certain lands subsequently taken in eminent domain proceedings, it is proper, in determining just compensation, to exclude from value as of the date of the taking such increase as occurred since the date of the authorization of the project and as a result thereof." (Syllabus, 317 U. S. 369).

The converse of this is equally true, that the owner cannot be penalized by the dimunition in the value of his land by the announced intention of the government to condemn it. Yet that is the effect of the holding in this case, because when the government elected to condemn the land, it at the same time destroyed the reasonable probability that the lands could be used for power purposes, and then acquired them

for their lessened value, tho that lessened value was produced solely as an incident of the taking.

This same principle is announced in *U. S. ex rel. Tennessee Valley Authority vs. Powelson,* 318 U. S. ....., 87 Law. ed. (Adv.) 976, where the court said:

> "The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation."

That in substance is what is accomplished in this case. At the time the Grand Coulee project was authorized, the company was preparing to build a power project on the lands and had pending an application for a federal license, which it offered to prove would, in the natural course of events, have been granted. The government then proceeded to take the lands at a value that was based upon the assumption that the government could and would make impossible their use for power site purposes by denying the Company a license.

We further respectfully urge that certiorari should be granted because the question here involved is one of general importance, which should have an authoritative and unequivocal answer by this court. Not only are power site lands on navigable streams involved, but likewise all such riparian lands whose value depends in part on the use of the waters of the stream. May the government take riparian lands at a price which they would bring, if they were non-riparian? Or must the government pay what any other willing buyer would pay for them? The opinions of this court

all indicate the government is under the latter obligation, although no additional hyopthetical value for "water power" need be paid if it is not actually reflected in the market value of the lands. (*U. S. vs. Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 57 Law. ed. 1063). Yet this holding in the Chandler-Dunbar case, which was applied correctly, we think, in the case of *Continental Land Co. vs. U. S.,* 88 Fed. (2d) 104, has now, in the opinion of petitioners, been erroneously construed and extended by the Circuit Court of Appeals for the Ninth Circuit, to mean, that no value adheres in riparian lands over and above their non-riparian uses, no matter how reasonably probable the riparian use may be, or no matter what may be the "market value fairly determined" of such lands (*U. S. ex rel. Tennessee Valley Authority vs. Powelson,* 318 U. S. ....., 87 L. ed. (Adv.) 976). Wholly aside from the manifest injustice to the defendants, which results in property being taken from it for $7,950.35 for which it paid $156,043.33 and spent $317,352.64 in actual development work, and which it could have sold for approximately one-half million dollars, the fact that hundreds of thousands of dollars invested in similar properties in the west alone, which may be affected by this ruling, make it a case in which this court should properly exercise its discretion and grant certiorari.

The United States cannot make a County party to a condemnation suit, have judgment entered on a declaration of taking granting title to realty in fee simple, and thereby escape paying the tax lien created by the Washington Statute.

The tax lien created by the Washington Statute upon the lands taken by the United States Government was a valid and existing lien under the words of the statute at the time the United States acquired the property. See Rem. Rev. Stat. 11265 (set forth in appendix). In construing that statute, Judge Schwellenbach, learned Judge of the District Court, said:

> " * * * There is no question under the statute that there is a valid lien. There is no question under the statute as between the purchaser and seller. If you acquire a property before the 15th of February, then the purchaser has to pay. * * * You are condemning property under the laws of the State of Washington and the laws of the State of Washington say if you acquire a piece of property prior to February and there are taxes due on it, taxes levied against it, that the purchaser pays the taxes, and if I go out and buy a piece of property and I buy it before the time, then I pay; if I buy it after the time, then the seller pays. * * *" (R. pp. 115, 116).

The highest Court of the State, the Washington Supreme Court, has twice construed the statute creating the lien in connection with the awards in condemnation cases. In both of those decisions, the Supreme Court of the State of Washington held that the provision of the statute, "but as between a grantor and a grantee, such liens shall not attach until the 15th day of February of the succeeding year," prevented the

lien from attaching as between condemnee and condemnor, and for that reason, where property was acquired before the designated day of the year succeeding that in which the tax was levied, taxes could not be paid out of the award. See *Bethany Presbyterian Church vs. The City of Seattle,* 154 Wash. 529, 282 Pac. 922; *State ex rel. Oregon-Washington Water Service Company vs. Hoquiam,* 155 Wash. 678, 287 Pac. 670.

The United States acquired the property with knowledge of the State law fixing the lien. The United States albeit protected with respect to proceedings against it without its consent, stands, so far as the existence of liens is concerned, in no different position from that of other purchasers of land in Washington. *United States of America vs. State of Alabama,* 313 U. S. 274, 85 Law. ed. 1327, 61 S. Ct. 1011.

The Circuit Court of Appeals took the position that the foregoing matters and things were immaterial for the reason:

> "The United States did not condemn the taxes or the lien therefor. It condemned the land. It is required to pay only just compensation for that land. The fact that the land may be subject to a lien has no bearing on the condemnation. It is generally held that so far as the lien is concerned the award stands in the place of the property." (R. p. 337), 135 Fed. (2d) 541.

We respectfully submit that in the opinion of petitioners herein the effect of such holding is to permit the United States to acquire title in fee simple to property in the State of Washington without discharg-

ing tax liens by the simple device of making counties parties to condemnation proceedings. While we might not be correct in asserting that in so holding, the learned Circuit Court of Appeals has so far departed from the accepted judicial course of proceedings as to call for an exercise of this Court's power of supervision, we respectfully state that in the opinion of petitioners, this question is of sufficient public importance to justify the issuance by this Court of the writ herein sought.

CONCLUSION

The questions which this application suggest should be definitely settled by this Court. These questions are

present in a large number of cases and involve considerable moneys.

Respectfully submitted,

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APPENDIX

Rem. Rev. Stat. §11265:

Life of lien — Between grantor and grantee — Lien of personalty tax — Following property — Personalty lien on realty. The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but as between a grantor and a grantee such lien shall not attach until the fifteenth day of February of the succeeding year. The taxes assessed upon each item of personal property assessed shall be a lien upon such personal property from and after the date upon which the same is listed with and valued by the County Assessor, and no sale or transfer of such personal property shall in any way affect the lien for such taxes upon such property. The taxes assessed upon personal property shall be a lien upon each item of personal property of the person assessed, distrained by the Treasurer as provided in section 86 of this act, from and after the date of the distraint and no sale or transfer of such personal property so distrained shall in any way affect the lien for such taxes upon such property. The taxes assessed upon personal property shall be a lien upon the real property of the person assessed, selected by the County Treasurer and designated and charged upon the tax rolls as provided in section 112 of this act, from and after the date of such selection and charge and no sale or transfer of such real property so selected and charged shall in any way affect the lien for such personal property taxes upon such property. (L. '39, ch. 206, § 45, p. 766, amending L. '35, ch. 30, § 7.)

No. 172

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, THE CITY OF [illegible], A MUNICIPAL COMPANY, A CORPORATION, [illegible], TRUSTEE, STATE OF [illegible], FERRY COUNTY, [illegible]

Un[illegible]

ON PETITION FOR [illegible]
STATES CIRCUIT [illegible]

BRIEF FOR [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 172

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, THE CITY BANK FARMERS TRUST COMPANY, A CORPORATION, AND RALPH E. MORTON, AS TRUSTEE, STEVENS COUNTY, WASHINGTON, AND FERRY COUNTY, WASHINGTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 116–132) is reported in 41 F. Supp. 119. The opinion of the circuit court of appeals (R. 332–338) is reported in 135 F. (2d) 541.

JURISDICTION

The judgment sought to be reviewed was entered April 30, 1943 (R. 338). A petition for rehearing was denied June 5, 1943 (R. 339.) The petition for a writ of certiorari was filed July 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the owner of lands bordering on a navigable stream is entitled to recover compensation for their power site value when such lands are condemned by the United States for the improvement of navigation.

2. Whether the United States, when it condemns land after taxes have been levied and assessed but before a lien attaches as between a grantor and grantee, is required to pay the amount of those taxes in addition to the reasonable value of the land condemned.

STATUTE INVOLVED

Section 11265, Wash. Rev. Stat. Ann. (Remington, 1932, as amended) [Laws, 1935, c. 30, sec. 7, as amended by Laws, 1939, c. 206, sec. 45, p. 766] provides:

> The taxes assessed upon real property shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid, but

as between a grantor and grantee such lien shall not attach until the fifteenth day of February of the succeeding year. * * *

STATEMENT

The United States on December 9, 1939, instituted condemnation proceedings (R. 2–20), accompanied by a declaration of taking (R. 20–31), to acquire from the Washington Water Power Company 330.31 acres of land riparian to the Columbia River at Kettle Falls, Washington—land which was to be flooded by the backwater from the Grand Coulee Dam, a multiple purpose structure designed (among other things) to control the floods, improve the navigability, and regulate the flow of the Columbia River (R. 96). Act of August 30, 1935, 49 Stat. 1028, 1039–1040.

The facts are not in dispute and may be summarized as follows: The lands described in the condemnation petition and declaration of taking are part of a larger tract acquired by the Washington Water Power Company in 1921 at a cost of $150,000 (R. 103, 119, 145). The lands are riparian to the Columbia River, a stream navigable "throughout its entire length in the United States" (R. 44). The condemned area includes 34.09 acres of upland on the right bank of the Columbia River in Ferry County, 207.37 acres of upland on the left bank in Stevens County, and two intervening islands (88.85 acres) likewise in

Stevens County (R. 31). These lands are so situated that, prior to the construction of the Grand Coulee Dam and the backing of the water 151 miles up the river to the Canadian border (R. 96), there could have been constructed, partly on the lands of the Washington Water Power Company and partly on lands in the bed of the river, a hydroelectric power plant at an initial cost of approximately $9,000,000 (R. 46, 120). Before such a project could have been constructed, it would have been necessary for the Washington Water Power Company to have acquired a flowage easement over 518 parcels of land in 400 different ownerships—state, federal, and private—for reservoir purposes (R. 54).

The parties stipulated, in advance of the trial, that the lands which are being condemned "have a reasonable value for agricultural, grazing and timber purposes and for all or any other purposes for which they are adapted other than for power site values equal to the amount deposited in the Court by the plaintiff as the estimated value of the said tract of land, to-wit: the sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars ($7,950.35)" (R. 45).

At the trial the condemnee proffered evidence of the power site value of the lands in question. The Government objected to this evidence, contending (1) that under the rule laid down in *United States* v. *Chandler-Dunbar Co.*, 229 U. S.

53, and followed in *Continental Land Co.* v. *United States,* 88 F. (2d) 104 (C. C. A. 9), certiorari denied, 302 U. S. 715, "a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein as against the United States and is, therefore, barred from a recovery for any power site value of its riparian lands" (R. 117); and (2) that inasmuch as the proposed dam at Kettle Falls would have flooded 518 tracts of privately owned land in 400 different ownerships (including lands owned by the United States and the State of Washington) the condemnee was not entitled to recover power site value because of the rule that "no owner of any one or any number of tracts less than the whole is entitled to be paid for a share of the value of the whole in condemnation proceedings unless there is a reasonable probability that all the ownerships could be combined" (R. 117).

The trial court, after examining the record, briefs, and decision in the *Continental Land Company* case, concluded that the evidence offered by the Washington Water Power Company was indistinguishable in principle from the evidence stricken in that case, and, accordingly, sustained the Government's objections (R. 116–132).

The taxing officials of Ferry and Stevens Counties, who had been made parties defendant because of their alleged tax liens against the property being condemned, raised one other issue dur-

ing the trial. They introduced evidence as to taxes which had been levied (R. 66–70, 79–82) and assessed (R. 73–78, 83–85) in 1939 (payable in 1940), but which had not been discharged. The court decided that the counties could recover these taxes from the Government (R. 115–116).

No issues of fact remaining, the court accordingly directed the jury to return a verdict for the Washington Water Power Company in the amount agreed upon by the parties as the value of the property exclusive of its adaptability for power site purposes, and, in addition, to return tax verdicts for Stevens and Ferry Counties in the sum of $3,003.96 (R. 247–248, 303–304). The Government excepted to the latter instructions and to the court's refusal to charge the jury that the taxes should be deducted from the stipulated value of the property ($7,950.35). The Washington Water Power Company appealed from the rulings as to power site value (R. 307), and the United States filed a cross-appeal on the tax question (R. 319–320).

The circuit court of appeals affirmed the judgment of the district court insofar as it allowed no compensation for power site value, relying upon its earlier decision in *Continental Land Co.* v. *United States,* 88 F. (2d) 104, certiorari denied, 302 U. S. 715, and reversed the judgment insofar as it made separate and additional awards to Stevens and Ferry Counties for 1940 taxes (R. 332–338).

ARGUMENT

1. The court below correctly ruled that just compensation does not require that the lands be valued in terms of their availability for water power purposes. The lands taken are in and adjacent to the Columbia River, a navigable waterway, which is subject to the plenary control of the United States. And since the availability of such lands for power purposes necessarily depends upon the flow of the navigable river it has been firmly established that the owner is not entitled, as against the United States, to compensation for any element of value attributable to the potential use of the lands for the generation of hydroelectric power. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Continental Land Co.* v. *United States*, 88 F. 2d 104 (C. C. A. 9), certiorari denied, 302 U. S. 715; see *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424, 427. The decision below is squarely in accord with these principles and therefore does not call for further review.[1]

The correctness of the decision below is emphasized by the fact that the petitioners could not have placed a dam across a navigable river like

[1] Since the Columbia River is navigable throughout, there is not here presented the question argued but not decided in *United States ex rel. T. V. A.* v. *Powelson*, No. 3, 1942 Term, whether the rule of the *Chandler-Dunbar* case extends to lands adjacent to a non-navigable stream subject to federal control.

the Columbia without first having obtained a permit from the Federal Power Commission. Federal Power Act of June 10, 1920, as amended, 16 U. S. C. sec. 797 (e). In 1935 Congress authorized the construction of the Grand Coulee Dam and the backing of the waters of the Columbia River upstream beyond Kettle Falls to the Canadian border. Act of August 30, 1935, 49 Stat. 1028, 1039–1040. At no time thereafter would the Federal Power Commission have authorized the construction of private dam at Kettle Falls. Without the necessary permit, or the possibility of obtaining such a permit, the land had no power site value at the time of its condemnation in 1939.

Moreover, as the record shows (R. 54), petitioners could not have constructed a dam at Kettle Falls without first having obtained a flowage easement over 518 parcels of land in 400 different ownerships—state, federal, and private. These lands could not have been joined without the exercise of the power of eminent domain. Thus, this case is brought within the principles enunciated by this Court in *United States ex rel. T. V. A.* v. *Powelson*, No. 3, October Term, 1942, and for that reason, if for no other, power site value was rightly refused. Cf. *Continental Land Co.* v. *United States*, 88 F. (2d) 104, 110 (C. C. A. 9), certiorari denied, 302 U. S. 715.

2. Petitioners further contend (Pet. 8, 22–24) that the United States, when it acquires property by condemnation, must not only pay into court a

sum equal to the 'fair market value" of the property, but must, in addition, deposit in court a sum sufficient to discharge tax liens. This contention, too, is without merit.

The United States is required by the Fifth Amendment to pay "just compensation" for the property which it takes, but nothing more. When a tract of land in which various persons have separate interests or estates is taken for public use, just compensation is determined as if the property were in a single ownership, without reference to conflicting claims or liens, and then apportioned among the parties according to their respective interests. *Carlock* v. *United States,* 53 F. (2d) 926, 927 (App. D. C.); *State* v. *Superior Court,* 80 Wash. 417, 420–421, 141 Pac. 906 (1914). The compensation awarded is for the land itself, and the value of the parts cannot exceed the value of the whole. *St. Louis* v. *Rossi,* 333 Mo. 1092, 1102–1103, 64 S. W. (2d) 600 (1933); *State* v. *Hall,* 325 Mo. 165, 170, 172, 28 S. W. (2d) 80 (1930); *Burt* v. *Merchants' Ins. Co.,* 115 Mass. 1, 15 (1874); *Detroit* v. *Fidelity Realty Co.,* 213 Mich. 448, 458–459, 182 N. W. 140 (1921). See 2 Lewis, Eminent Domain (3d ed. 1909) p. 1253; 1 Nichols, Eminent Domain (2d ed. 1917) pp. 707, 708.

Taxes levied and assessed against property do not add to its value. *Pacific National Bank* v. *Bremerton Bridge Co.,* 2 Wash. (2d) 52, 57–58, 97 P. (2d) 162 (1939). Thus, even though a tax

lien or other encumbrance exceeds the value of the property, the Government can still acquire that property by paying "just compensation," whether that amount is sufficient to discharge all the encumbrances or not. *Detroit* v. *Fidelity Realty Co.,* 213 Mich. 448, 458–459, 182 N. W. 140 (1921);[2] *Housing Authority of Butte* v. *Bjork,* 109 Mont. 552, 554–555, 98 P. (2d) 324 (1940); cf. *United States* v. *Greer Drainage Dist.,* 121 F. (2d) 675 (C. C. A. 5).

Since a proceeding to condemn land for public use is a proceeding *in rem* against the land sought to be taken, it extinguishes all previously existing estates or interests in the land. *Duckett & Co.* v. *United States,* 266 U. S. 149, 151; *United States* v. *Dunnington,* 146 U. S. 338, 351, 352–353; *Weeks* v. *Grace,* 194 Mass. 296, 299–300, 80 N. E. 220 (1907). The award when made stands in place of the land, and the rights of all persons are transferred to the award. *United States* v. *Dunnington,* 146 U. S. 338, 351; *United States* v. *Certain Parcels of Land,* 44 F. Supp. 936, 937 (S. D. Cal.); *Board of Capitol Managers* v.

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[2] In the *Detroit* case, a mortgagee contended that the award could not be less than the amount of the mortgage. In rejecting this contention the court said (p. 458):

"Private property may not be taken without 'just compensation.' On the other hand, the public * * * is entitled to acquire the title upon payment of 'just compensation,' * * * just compensation is measured by the fair market value of the property. This is neither increased nor diminished by the fact that a mortgage has been executed [or, as in this case, taxes have been levied] on the property."

Braisie, 72 Colo. 153, 155–156, 210 Pac. 63 (1922); *St. Louis* v. *Rossi,* 333 Mo. 1092, 1102, 64 S. W. (2d) 600 (1933). Thus, it follows that when the United States has paid into court the fair market value of the land it has no further liability and is entitled to have all claims paid out of the funds deposited. *United States* v. *Dunnington,* 146 U. S. 338, 352–353; *United States* v. *Certain Lands in Borough of Brooklyn,* 129 F. (2d) 577, 579 (C. C. A. 2); *State* v. *Superior Court,* 80 Wash. 417, 420–421, 141 Pac. 906 (1914); see *United States* v. *Eisenbeis,* 112 Fed. 190, 199 (C. C. A. 9).

The most frequent application of this rule arises in cases holding that tax liens must be satisfied out of the award. *United States* v. *Certain Parcels of Land in Philadelphia,* 130 F. (2d) 782, 783 (C. C. A. 3); *Cobo* v *United States,* 94 F. (2d) 351, 353 (C. C. A. 6) *Coggeshall* v. *United States,* 95 F. (2d) 986, 990 (C. C. A. 4); *United States* v. *Certain Parcels of Land,* 44 F. Supp. 936, 937, 939 (S. D. Cal.); *United States* v. *44,549 Square Feet of Land,* 41 F. Supp. 523, 525 (E. D. N. Y.); *United States* v. *Certain Lands in the Town of Hempstead,* 31 F. Supp. 513 (E. D. N. Y.); *Board of Capitol Managers* v. *Braisie,* 72 Colo. 153, 155–156, 210 Pac. 63 (1922); *Ross* v. *Gates,* 183 Mo. 338, 347–348, 81 S. W. 1107 (1904); *In re Sleeper,* 62 N. J. Eq. 67, 68–69, 49 Atl. 549 (1901); see *People of Puerto Rico* v. *United States,* 131 F. (2d) 151 (C. C. A. 1); cf. *United States* v. *Lands*

in Hempstead, Nassau Cy., N. Y., 129 F. (2d) 918, 919–920 (C. C. A. 2); *St. Paul* v. *Certain Lands in St. Paul*, 48 F. (2d) 805, 807 (C. C. A. 8).

In the instant case the verdict of $7,950.35 which the jury was directed to return in favor of the Washington Water Power Company represents the fair market value of the land (R. 45). In fact, there was no evidence to support a different award. To require the Government to pay to Stevens and Ferry Counties an additional $3,006.96 would mean that the Government, in order to acquire property by condemnation, would have to pay more than the "just compensation" prescribed by the Fifth Amendment. It is evident, therefore, that the claim for taxes must be satisfied out of the sum deposited with the declaration of taking and found by the court to be the fair market value of the property.

The tax statutes of Washington do not purport, even if they could, to dictate any contrary result. Section 11265, Wash. Rev. Stat. Ann. (Remington 1932, as amended) provides that a tax lien upon real estate does not, as between grantor and grantee, attach until February 15 of the year after the taxes are levied. The taxes in question were assessed and levied in 1939 (R. 66, 76, 79, 84). The Government took title to this property when it filed its declaration of taking on December 9, 1939 (R. 33). Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258a. Hence, if the United

States is a grantee under that statute, no lien could attach as against the Government until February 15, 1940. That a condemnor is a "grantee" under the foregoing statute has been expressly decided by the Supreme Court of Washington. *Bethany Presbyterian Church* v. *Seattle,* 154 Wash. 529, 282 Pac. 922 (1929); cf. *Commissioner* v. *Plestcheeff,* 100 F. (2d) 62 (C. C. A. 9).

Indeed since no tax lien attaches against the condemnor until February 15 of the year following the levying and assessment of the tax, no tax lien can ever arise against this property which the Government condemned and for which it has paid just compensation, because lands belonging to the United States cannot be taxed by the State of Washington or its political subdivisions. Wash. Const., Art. 7, sec. 2; Wash. Rev. Stat. Ann. (Remington 1932) sec. 11111; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 179–180.

The case of *United States* v. *Alabama,* 313 U. S. 274, relied on by petitioners (Pet. 23), announces no contrary doctrine. There the United States, subsequent to the tax lien date but prior to an actual levy and assessment, *purchased* certain lands in Alabama. This Court held that under Alabama law the lien was effective and that the United States, like any other purchaser, would have to discharge that lien if it desired an unencumbered title. But when the United States *condemns* land, it can acquire an absolute fee by

paying into court the fair market value of the property—just compensation. Any tax or mortgage liens, as all the foregoing authorities agree, must be satisfied out of the award.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943